IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 14, 2006

CRAIG LAMONT BEENE v. STATE OF TENNESSEE

Appeal from the Circuit Court for Dickson County
No. CR6611 Robert E. Burch, Judge

No. M2005-01322-CCA-R3-PC - Filed March 17, 2006

This is an appeal from the denial of post-conviction relief. The Petitioner, Craig Lamont Beene, pled guilty to and was convicted of attempted first-degree murder, especially aggravated kidnapping, and aggravated assault. Pursuant to a plea agreement, the Petitioner was sentenced to seventeen years imprisonment. The Petitioner filed for and was denied post-conviction relief. The Petitioner now appeals the trial court's order denying post-conviction relief, claiming his trial counsel provided ineffective assistance of counsel which resulted in unknowing and involuntary guilty pleas. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JOHN EVERETT WILLIAMS, JJ., joined.

Lindsay C. Barrett, Dickson, Tennessee, for the appellant, Craig Lamont Beene.

Paul G. Summers, Attorney General and Reporter; Seth P. Kestner, Assistant Attorney General; Dan Alsobrooks, District Attorney General; and Mark A. Fulks, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

The facts underlying the convictions at issue in this case were stated by the post-conviction court as follows:

> [The] Petitioner forced his former wife and their child into his car at a day care center in Dickson at the point of a gun. Petitioner then drove off with his former spouse and their child in the car. His former spouse dialed 911 on a cell phone that

> she had in her pocket and left it there so the police could determine what was occurring. Petitioner told the victim that she was going to die and struck her at least twice. As petitioner stopped near the local radio station, the victim jumped from the car and ran into the radio station. Petitioner fired at her twice and pursued her inside the radio station, leaving the child unattended in the car. Inside the radio station, Petitioner continued to intimidate the victim and pointed the gun at the disc jockey. After talking to police, Petitioner released the victim. Petitioner was ultimately arrested.[1]

In April of 2003, a Dickson County grand jury issued a seven-count indictment against the Petitioner.[2] In August of 2004, a trial commenced on five charges: attempted first-degree murder, see Tenn Code Ann. § 39-13-202; two counts of aggravated assault, see id. § 39-13-102; especially aggravated kidnapping, see id. § 39-13-305; and reckless endangerment, see id. § 39-13-103. At trial, the victim testified about the events at issue and authenticated the audio tape of the 911 call, which recorded a significant portion of the crimes in "real time." This audio tape, which was played for the jury, captured several conversations, including the Petitioner's threats to kill the victim. It also recorded the victim's child screaming in fear and pleading, "[D]on't kill her." The tape also captured what sounded like two gunshots.

After the victim's testimony, but before cross-examination, the trial recessed for a lunch break. Upon conclusion of the lunch break, the Petitioner indicated he wished to accept a plea agreement and enter guilty pleas. Pursuant to a negotiated plea agreement, the Petitioner pled guilty to attempted first-degree murder, especially aggravated kidnapping, and one count of aggravated assault in exchange for an agreed sentence of seventeen years. The trial court conducted a thorough plea colloquy, during which the court stated:

> The main thing I'm interested in, Mr. Beene, is that it's your idea, this is what you want to do, nobody's trying to talk you into anything that you don't want to do. And as I understand it, after talking with your family and talking with your lawyer, you want to enter this plea and take seventeen years, is that right?

The Petitioner responded, "Right." The court also asked the Petitioner if his attorney explained the accusations made in the indictments against him; if he wanted to give up his rights by pleading guilty; if he was "satisfied with [his] attorney's services," and if he was "pleading guilty voluntarily and of [his] own free will." To all these questions the Petitioner answered, "Yes, sir." Additionally, regarding the sentence, the trial court informed the Petitioner: "And you understand that this is seventeen years, and at least one of them is what they call a hundred percent. Which you'll have to

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[1] The trial court summarized the facts as recited above in its order denying post-conviction relief. The court also noted in this order that these facts were "introduced through the testimony of the victim" at trial.

[2] In addition to the three charges to which the Petitioner pled guilty, the Petitioner was also indicted for conspiracy to commit aggravated assault, conspiracy to commit especially aggravated kidnapping, a second count of aggravated assault and reckless endangerment.

serve a hundred percent of it. . . .[Y]ou understand that you're going to have to serve all of that."[3] Acknowledging that he understood his sentence, the Petitioner responded, "Yes, sir" four times.

At the conclusion of the plea colloquy, the trial court accepted the Petitioner's guilty pleas and sentenced him to seventeen years for each of his Class A felony convictions (attempted first degree murder and especially aggravated kidnapping), and three years for his Class C felony aggravated assault conviction. The court ordered the sentences be served concurrently for an effective sentence of seventeen years. In December of 2004, the Petitioner filed a pro se "Motion for Correction or Reduction of Sentence or Post-Conviction Relief." An attorney was appointed and the Petitioner was granted thirty days to file an amended post-conviction petition that complied with Tennessee's Post-Conviction Act. An amended post-conviction petition was filed alleging ineffective assistance of counsel and involuntary guilty pleas. An evidentiary hearing was conducted in May of 2005.

At the post-conviction hearing, the Petitioner testified that his retained attorney ("Trial Counsel") met with him only two times prior to trial, never advised him of a plea offer until the day of his trial, and failed to inform him that the agreed sentence of seventeen years had to be served in full. The Petitioner also stated that Trial Counsel did not show him any discovery materials until the day before the trial, and claimed that he pled guilty only because he thought Trial Counsel was not prepared for trial. The Petitioner further testified that, while he was on medication for a mental disorder from the time of the offenses until after his convictions, he never received medical "treatment" between the date of his initial competency evaluation and trial. The Petitioner conceded that he informed the court at the time he entered his pleas that he fully understood his rights and voluntarily waived them, but maintained that he really didn't know what he was saying during the plea hearing and simply repeated "Yes, sir" over and over again without thinking.

The Petitioner's trial counsel testified at the post-conviction hearing that he had twenty-five years of experience as an attorney and practiced primarily criminal law. Trial Counsel further testified that he talked to the Petitioner ten to fifteen times on the phone in addition to his in-person meetings with the Petitioner; he explained all of the charges and possible sentencing ranges to the Petitioner; he took the discovery materials to the Petitioner and went over the strengths of the State's case with the Petitioner; and he was fully prepared for trial. Trial Counsel stated that the Petitioner's initial medical evaluation found that the Petitioner was competent to stand trial and nothing in his observations led him to believe that the Petitioner was "anything other than competent." As to informing the Petitioner that he must serve 100% of his agreed sentence, Trial Counsel stated that he was "confident that [the Petitioner] knew" he had to serve the full seventeen years.

Trial Counsel also testified that the Petitioner was aware of a plea offer long before trial, but initially declined this offer and instead elected to go to trial. Trial Counsel explained that, after

[3] A conviction for especially aggravated kidnapping requires 100% service of sentence. See Tenn. Code Ann. § 40-35-501(i)(1) and (2)(C).

seeing the victim on the stand and listening to the 911 audio tape during trial, the Petitioner stated he did not want to put his former wife through any more testimony and asked Trial Counsel to see if the plea deal was still available. On cross-examination, Trial Counsel testified that the Petitioner's "plea was voluntarily made and it was the right decision." The post-conviction court issued an order on May 19, 2005, denying the Petitioner's request for post-conviction relief. This appeal followed.

ANALYSIS

On appeal, the Petitioner asserts the trial court erred in denying his claim for post-conviction relief because his "guilty pleas were not voluntary and knowing due to his trial counsel's ineffectiveness." To support this claim, the Petitioner argues that his trial counsel provided deficient representation by: 1) failing to inform him of his proper release eligibility date, 2) failing to provide the Petitioner with the discovery materials or inform him of the case against him, and 3) failing to present a defense of mental incompetence. Furthermore, the Petitioner claims that, but for the deficiencies of his trial counsel, he would have followed through with his trial, and therefore his guilty pleas were not knowingly and voluntarily entered.

To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The trial judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

Both the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to "reasonably effective" assistance, that is, within the range of competence demanded of attorneys in criminal cases. See Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant's lawyer, and actual prejudice to the defense caused by the deficient performance. See id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant's failure to prove either

deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. See Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

This two-part standard of measuring ineffective assistance of counsel also applies to claims arising out of a guilty plea. See Hill v. Lockhart, 474 U.S. 52, 58 (1985). The prejudice component is modified such that the defendant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59; see also Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of "reasonableness." See Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel's alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. See id. "However, a trial court's conclusions of law--such as whether counsel's performance was deficient or whether that deficiency was prejudicial--are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court's conclusions." Id.

Additionally, our supreme court, in setting forth the standard for identifying a constitutionally valid guilty plea, noted that "before a trial judge can accept a guilty plea, there must be an affirmative showing that it was given intelligently and voluntarily." State v. Pettus, 986 S.W.2d 540, 542 (Tenn. 1999) (citing to Boykin v. Alabama, 395 U.S. 238, 242 (1969)). Our high court further noted that "a plea is not 'voluntary' if it is the product of '[i]gnorence, incomprehension, coercion, terror, inducements, [or] subtle or blatant threats,'" Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993) (quoting Boykin, 395 U.S. at 242-43), or if the defendant is "incompetent or otherwise not in control of his mental facilities" when the plea was entered. Id.

After considering the testimony presented at the post-conviction hearing, the trial court issued an order, containing both findings of fact and a legal analysis, in which it concluded that post-conviction relief was unwarranted. Addressing the Petitioner's claim that Trial Counsel failed to advise him of his proper release eligibility date, the trial court stated "[t]his allegation defies logic," noting that the evidence showed that Trial Counsel did advise the Petitioner he would be required to serve 100% of his seventeen-year sentence. However, the trial court added, even if counsel did

"not so advise Petitioner . . . this Court specifically and in detail explained to Petitioner that his release eligibility date would be 100% on the seventeen year sentences. Several times, Petitioner acknowledged that he understood." Dismissing the Petitioner's argument that he "wasn't really paying attention" during the plea colloquy, the trial court concluded: "This Court finds Petitioner's explanation to be a 'bald face lie[.]' He knew when he entered his plea that his release eligibility would be 100% and now he is attempting to lie out of it because he has apparently had second thoughts."

The trial court also found that the Petitioner failed to establish by clear and convincing evidence that his counsel was ineffective for failing to present discovery materials and properly explain the strength of the case against the Petitioner. The court noted:

> It is difficult to imagine a circumstance in which counsel met with Petitioner for over half an hour, gave him discovery materials and did not discuss the facts of the case. Petitioner admitted that he had the discovery materials. This Court is unconvinced that trial counsel failed to advise Petitioner of the strength of the case against him.

Finally, the trial court concluded that the Petitioner failed to present evidence which would show his trial counsel's representation was deficient for failure to pursue a diminished capacity defense. Correctly noting that diminished capacity is not technically a defense but rather an evidentiary rule, see State v. Hall, 958 S.W.2d 679, 688 (Tenn. 1997), the trial court stated:

> Petitioner has not introduced any evidence which would establish that the requisite mental state required to prove certain of the crimes to which he pled guilty . . . could not have been proved by the state. Even assuming that Petitioner had a recognized mental condition, he did not establish that such a condition affected him in such a way as to render him incapable of forming the requisite intent.

After considering the evidence contained in the record on appeal, we conclude that the Petitioner has failed to carry his burden of demonstrating that the evidence preponderates against the trial court's findings. The Petitioner insisted at the post-conviction hearing and now again on appeal that his trial counsel failed to inform him that he would have to serve 100% of his seventeen-year sentence. However, the evidence does not preponderate against the trial court's finding that the Petitioner had his release eligibility date meticulously explained to him. We conclude that the Petitioner has failed to provide clear and convincing evidence that his trial counsel failed to inform him of his proper release eligibility date. Nonetheless, it is readily apparent that even if Trial Counsel failed in this respect, such a deficiency did not result in prejudice considering the trial court's careful explanation of the release eligibility date as well as the Petitioner's four separate affirmative acknowledgments that he understood he must serve 100% of his sentence.

Likewise, we agree that the Petitioner has failed to provide clear and convincing evidence that his counsel failed to provide discovery materials and failed to explain the strength of the State's case against him. To the contrary, the evidence reveals that Trial Counsel did provide the discovery

materials to the Petitioner, met with the Petitioner in person two or three times, and talked with the Petitioner over the phone ten to fifteen times. Trial Counsel was prepared for trial, and indeed went to trial. Trial Counsel testified at the post-conviction hearing that he thoroughly advised the Petitioner of the case against him. The Petitioner asks this Court to discredit Trial Counsel's testimony and accredit his own. However, as stated above, this Court will not re-weigh or re-evaluate evidence, and all questions concerning the credibility of witnesses and the weight and value to be given their testimony are to be resolved by the trial court, and not be appellate courts. See Momon, 18 S.W.3d at 156.

We are also unpersuaded by the Petitioner's argument that his counsel provided deficient representation by failing to pursue a defense strategy of arguing diminished capacity or mental incompetence. The Petitioner asserts in his appellate brief that "[t]he court report based on the initial evaluation clearly indicates that [Petitioner's] competency to participate in his own trial, or voluntarily and knowingly enter a guilty plea, depended on continued psychiatric treatment, which [Petitioner] testified at the post-conviction hearing that he did not receive." However, the Petitioner failed to present any testimony, from medical experts or otherwise, at his post-conviction hearing that he was mentally incompetent when he entered his guilty pleas or had diminished capacity that would have negated the requisite culpable mental state for the crimes of which he was convicted.

The record contains a medical competency evaluation signed by Dr. Melinda Lafferty, Licenced Psychologist, and dated March 16, 2004, in which the Petitioner was found to be competent to stand trial and unqualified for the defense of insanity. This letter also stated that it is "recommended that Mr. Beene continue with psychiatric treatment in order to maintain competency." The Petitioner testified that he did continue to take medication for his mental illness throughout the time leading up to and after the entry of his guilty pleas. Also, Trial Counsel testified that he noticed nothing about the Petitioner that would have indicated to him that he was anything other than competent. Immediately after accepting the Petitioner's pleas of guilty, the trial court made the following statement for the record:

> Let the record show that the Court has determined that Mr. Beene has answered the question in an intelligent fashion, asked questions when appropriate, understood the explanation; he seemed to me to be certainly more intelligent than the normal Defendant that I get, and certainly understanding himself and knowing what he was doing. I was concerned about whether he would understand, but I am convinced of his -- that today at least, that he understood what he was doing and understood his waiver of his rights and so forth, so the Court makes that finding on the record.

We agree that the Petitioner has failed establish that he suffered from any form of diminished capacity or mental incapacity that would have rendered his pleas unknowing or involuntary. The Petitioner has failed to demonstrate that Trial Counsel was deficient in his representation for failing to pursue a mental incapacity defense.

After examining the entire record on appeal, we agree with the trial court that the Petitioner has failed to prove his trial counsel provided deficient representation in any respect. Having found that the Petitioner failed to meet the first prong of the Strickland test, we need not examine the issue further. Nonetheless, we note that the Petitioner has also failed to prove that "but for" the alleged errors of his trial counsel he would have insisted upon going to trial, or more accurately in this particular case, continued his trial to its conclusion. Lockhart, 474 U.S. at 59.

Based on the evidence in the appellate record, the Petitioner's trial counsel provided representation that was neither deficient nor prejudicial. We conclude that the trial court did not err in finding the Petitioner's guilty pleas were entered knowingly and voluntarily and were not the result of coercion due to the alleged ineffective assistance of counsel. This issue is without merit.

CONCLUSION

Finding no error, the judgment of the trial court denying the Petitioner post-conviction relief is affirmed.

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DAVID H. WELLES, JUDGE